IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REUBEN B. ROBERTSON, III, ET AL.,

Plaintiffs-Appellees,

v.

JOHN H. SHAFFER, ET AL.,

Defendants-Appellants.

No. 72-2186

MEMORANDUM CONCERNING THE EFFECT OF
WEISBERG v. DEPARTMENT OF JUSTICE

This memorandum is in response to the order of November 14, 1973, wherein this Court requested "memoranda from the parties concerning the effect on this case of the Court's recent en banc decision in Weisberg v. Department of Justice, No. 71-1026 (October 24, 1973)." 1/ We would note at the outset, however, that in our view the SWAP reports are exempted from disclosure not only by Exemption 7, but also by the other exemptions raised in our briefs, particularly Exemption 3, and that, therefore, it is not necessary for this Court to reach the issue involving Exemption 7.

In Weisberg, this Court established that the documents are protected from disclosure by Exemption 7 if it is determined that they "were investigatory in nature" and "were

1/ This decision will be cited as Weisberg, slip op., p. __.

compiled for law enforcement purposes." Weisberg, slip op., p. 6. Once it is determined that the documents sought are contained in such a file, they are exempt, and it is not necessary to engage in any "balancing" or to establish any further elements to invoke the exemption, e.g., establish any further that each document in the file is separately protected by Exemption 7. Moreover, in Weisberg, this Court specifically rejected the test contained in the original panel decision that the government had to establish the nature of some harm which was likely to result from public disclosure of the files. See Weisberg, slip op., pp. 18-23, (Bazelon, C.J., dissenting). In addition, Weisberg rejects the notion that Exemption 7 applies only to "open" files and that there must be a concrete prospect of future enforcement proceedings. Accordingly, in cases in which Exemption 7 is invoked, the judicial inquiry is limited to determining whether the agency's classification of the materials as an investigative file compiled for law enforcement purposes is proper. 2/ Weisberg, slip op., p. 14.

2/ As a result of the en banc decision in Weisberg and Aspin v. Department of Defense, No. 72-2147 (November 26, 1973), which also supports our position, plaintiffs' argument on Exemption 7 is virtually stripped of authority. Moreover, plaintiff sought to distinguish Frankel v. S.E.C., 460 F. 2d 146 (C.A. 2, 1972), and Evans v. Department of Transportation, 446 F. 2d 821 (C.A. 5, 1971), upon which we rely, so as to limit the purposes underlying Exemption 7. This Court, however, has held that Frankel and Evans correctly set out the purposes of Exemption 7. Weisberg, slip op., pp. 6, 7; Aspin, slip op., pp. 12-13.

The record in this case supports our view that the SWAP reports are "investigatory files compiled for law enforcement purposes." We pointed out in our main brief, p. 26, n. 13, that one of the objectives of a SWAP report is to determine an operator's compliance with F.A.A. regulations; that while SWAP teams do not process violations, the SWAP reports are transmitted to the district offices and those offices have the responsibility to determine whether a violation occurred and the course of enforcement action; and that the possible courses of action are a Letter of Correction, Safety Compliance Notice, Certificate action, or civil penalty. Accordingly, we submit that the SWAP reports are properly characterized as investigatory files compiled for law enforcement purposes and are, therefore, under Weisberg, exempt from disclosure by Exemption 7. 3/

We recognize, however, that the district court has not had the opportunity to evaluate the government's Exemption 7 claim in the light of Weisberg and that the record was not developed with the Weisberg principles in mind. For this reason, if the Court should reject our view that other

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3/ In any event, the record certainly precludes the entry of summary judgment on this point.

exemptions clearly cover the case, the Court may find it appropriate to remand the case to the district court for the purpose of evaluating the Exemption 7 claim in light of Weisberg.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1973, a copy of the foregoing Memorandum Concerning the Effect of Weisberg v. Department of Justice was served upon counsel for the appellees, by mail, postage prepaid, to:

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